Filed 8/14/09 Freeman v. Long Beach Civil Serv. Com. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JERRY FREEMAN, Plaintiff and Appellant, v. CITY OF LONG BEACH CIVIL SERVICE COMMISSION, Defendant and Respondent.	B209409 (Los Angeles County Super. Ct. No. BS109912)

APPEAL from a judgment of the Superior Court of Los Angeles County. David P. Yaffe, Judge. Affirmed.

Cantrell, Green, Pekich, Cruz & McCort, Danny T. Polhamus for Plaintiff and Appellant.

Robert E. Shannon, City Attorney, Christina L. Checel, Deputy City Attorney for Defendant and Respondent.

Appellant Jerry Freeman was a firefighter for the City of Long Beach. He applied to the Long Beach Civil Service Commission for a service retirement pending industrial disability retirement pursuant to Government Code section 21151, effective May 2005, based on his history of melanoma. After he was examined by the Occupational Health Physician for the City's Department of Health and Human Services, Dr. Irene Grace, the Long Beach Civil Service Commission found that appellant was not incapacitated for the performance of duty and that he could return to work, subject to certain restrictions. His application for a disability retirement was denied.

Appellant appealed the denial to the Long Beach Civil Service Commission and, in accordance with Commission rules, a hearing took place before an administrative law judge. The administrative law judge found that appellant had not proven by a preponderance of evidence that he was substantially incapacitated from performing his usual duties. The Commission approved the judge's findings and denied appellant's disability retirement. Appellant petitioned the superior court for a writ of mandate pursuant to Code of Civil Procedure section 1094.5. The superior court denied the petition on the grounds that the weight of evidence supported the decision of the Long Beach Civil Service Commission.

The decision of the trial court is affirmed.

STANDARD OF REVIEW

The trial court applies independent judgment in reviewing the Commission's decision regarding disability retirement. (*Jones v. Los Angeles County Office of Educ.* (2005) 134 Cal.App.4th 983, 989.) Despite the term "independent judgment," "a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.)

On appeal "[w]e review the trial court's independent assessment of the administrative record and not the findings of the administrative agency." (*Spitze v. Zolin*

(1996) 48 Cal.App.4th 1920, 1925.) Thus, while the superior court operated under the independent judgment standard of review, we may only decide whether that court's decision is supported by substantial evidence. (*Fukuda v. City of Angels, supra,* 20 Cal.4th at p. 824; *Moran v. State Bd. Of Medical Examiners of the State of California et. al.* (1948) 32 Cal.2d 301, 308-309.)

Substantial evidence is defined as "'ponderable legal significance . . . reasonable in nature, credible, and of solid value[, and] . . . relevant evidence that a reasonable mind might accept as adequate to support a conclusion.'" (*Young v. Gannon* (2002) 97 Cal.App.4th 209, 225 quoting *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335.)

All evidence is viewed most favorable to the judgment and any evidentiary conflicts are likewise resolved. All inferences must be drawn in support of the judgment. (*Young v. Gannon, supra,* 20 Cal.4th at p. 225.) A "burden of proof or persuasion" is "cast[] upon 'the complaining party' (and not the administrative agency) . . . and not a mere burden of production or of coming forward with evidence." (*Fukuda v. City of Angels, supra,* 20 Cal.4th at p. 820.)

STATEMENT OF FACTS

Appellant worked for the City of Long Beach for 25 years and retired effective May 5, 2005, with a pending service disability retirement based on his history of melanoma, which was partially attributed to sun exposure during work.

Appellant first started having skin lesions and pre-cancerous lesions in the 1980s. His first melanoma was diagnosed by his dermatologist, Dr. Daniel McKenzie, in July of 2004, and was removed in surgery that same month. Appellant returned to his normal duties after this surgery with no work restrictions. Appellant was diagnosed with his second melanoma in November of 2004. He was referred to Dr. James Jakowatz, an oncologist, for surgery to remove the lesion. Appellant last worked as a firefighter on November 14, 2004. Following this surgery, he received chemotherapy treatment for 20 sessions over a one month period. From November 2004 until his retirement, appellant

used vacation and other leave for compensation. He began his service retirement on May 6, 2005. His decision to retire was based upon his own belief that he was incapable of returning to work as a firefighter.

On July 11, 2005, appellant was examined by Dr. Irene Grace, the Occupational Health Services Officer for the City. Dr. Grace also reviewed appellant's medical records and essential job functions to determine whether he was able to return to work in some fashion. As dermatology and oncology were not in her specialty, she relied on medical evaluations from two doctors, Borok and Jakowatz, obtained in appellant's worker's compensation case, as well as Dr. Jakowatz's deposition, and medical literature. After the examination and after reviewing appellant's records, Dr. Grace concluded that appellant was fit to return to work. The City rejected appellant's application for a disability retirement.

Dr. Borok, a Board-Certified Dermatologist and Qualified Medical Examiner, performed an examination and reviewed appellant's medical records from prior treating physicians. In his evaluation, Dr. Borok opined that "[appellant] should always wear sun-protective clothing, including a broad-brimmed hat or hat that actually covers his neck, long-sleeved shirts, pants, and sunscreen that is at least an SPF-30 rated on his face whenever he is outside. He should not be outside continuously for more than one-half hour during a normal 12-hour day that is [in direct] sun exposure. He should try to avoid direct sun exposures as best he can." Dr. Borok continued to say "[appellant] medically probably could work as a firefighter and paramedic as long as he remains covered up whenever he goes outside. [Appellant] should not do any physical training [or take] his lunchtime, dinnertime, or breakfast times outdoors or do any drills outdoors. He can basically do all his activities indoors and when necessary fighting a fire outdoors wear his sun-protective clothing and sunscreen. . . . In summary, [appellant] can return to his full and usual and customary duties so long as they are done indoors or when he is outdoors he is covered up with some protective clothing and wearing an SPF-30 sunscreen on his face. The claimant should not remain in direct sunlight for more than a half hour in any shift."

In his deposition, Dr. Jakowatz was asked whether he would impose any work restrictions on appellant. He replied "[o]nly to watch the sun." When asked to clarify this statement, he responded that appellant should "try to protect himself with sunscreen, avoid the peak hours of sun, wear the appropriate clothing, appropriate sunscreen." Dr. Jakowatz affirmed that appellant was able to return to work as a firefighter without any known impairment.

Dr. Borok issued a supplemental report on March 22, 2006, after reviewing appellant's and Dr. Jakowatz's depositions and the qualified medical examination by Sam Alaiti, M.D. Dr. Borok's opinions and conclusions remained unchanged. He noted that Dr. Jakowatz, "who is an expert in the field as a surgical oncologist treating melanomas," had stated that appellant "should be able to return to his duty as a firefighter with no work restrictions other than to avoid direct sun exposure, wear sun-protective clothing, and sunscreen."

During the administrative hearing, the administrative law judge found that Dr. Grace had testified credibly, reiterating her opinion that appellant was capable of returning to work as a firefighter. She opined that it was possible for a city firefighter to perform his usual duties using prophylactic methods of sunscreen application, wearing protective clothing, and limiting exposure to sunlight as much as possible. She pointed out that while fighting a fire, firefighters are in full turnout gear and a hat, which protected him from the sun.

The evidence did not specifically establish all of the usual and customary duties of a city firefighter in May 2005. The evidence only established that usual duties may include exercise and drills as well as fighting fires.

DISCUSSION

The work-related nature of the cancer is not contested. The true meaning of the restrictions imposed by the doctors is the key issue in this case. Appellant claims that there was error in the findings of the superior court about the restrictions and in the

application of case law. After review, we find that the holdings of the superior court are supported by substantial evidence. Therefore, the judgment must be affirmed.

Appellant contends that the administrative law judge and the superior court incorrectly interpreted the work restrictions imposed by his doctors to mean that he was still able to perform his duties as a firefighter. Appellant reads them instead to mean that he must avoid anything other than short exposure to the sun, even if he is wearing protective clothing and sunscreen on the exposed parts of his body. He argues that as a result of these restrictions, he is not fit to continue his work as a firefighter and therefore his disability retirement should be granted. Appellant finishes by contending that even if these restrictions are classified as prophylactic only, a disability retirement may validly be granted on the basis of prophylactic restrictions.

Government Code section 21151 reads:

> (a) Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

Government Code section 20026 states:

> 'Disability' and 'incapacity for the performance of duty' as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.

"Incapacitated for performance of duty" means the "substantial inability of the applicant to perform his usual duties," and not simple discomfort or difficulty. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877; *Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854.)

Appellant concedes that he is able to meet the physical requirements of a firefighter, but considering his condition, he argues he cannot fulfill the basic duties of a firefighter. He states that the doctors understood the full weight and consequence of their diagnoses and restrictions and intended them to be read in their totality to restrict him from being in the sun for more than thirty minutes.

However, these doctors all opined that appellant was fit to return to duty as a firefighter, and that is substantial evidence for the judgment here.

In combination, these opinions that appellant should not be in the sun over thirty minutes and that he was able to perform his duties express the idea that while appellant should not be in the sun for more than thirty minutes in order to protect his future health, extending his exposure would not detrimentally affect his current ability to perform his duties as a fireman. After half an hour in the sun his abilities to run, carry a hose, lift objects, think quickly, or any other requirement associated with his position would not depreciate. At the moment, his skin cancer, and the risk of its return, has not incapacitated him.

Appellant relies heavily upon *Wolfman v. Board of Trustees* (1983) 148 Cal.App.3d 787, 791. In *Wolfman*, a teacher was granted a disability retirement based upon the serious aggravation of her asthma and bronchitis due to the proximity to young children in her role as an elementary school teacher. (*Id.* at p. 791.) Severe aggravation of asthma and a bronchial condition would understandably prevent a teacher from effectively fulfilling her duties. She would constantly have to leave the classroom and would be subject to frequent asthma attacks. Thus, while the restrictions may be considered prophylactic in that they aimed to alleviate her afflictions and reduce her dependence on antibiotics and dangerous steroids, her condition was, at present, preventing her from carrying out her duties. The facts at hand do not establish a similar situation. Appellant is able to perform his duties satisfactorily, even if he remains in the sun more than thirty minutes.

Appellant has failed to carry his burden of proof or persuasion by proving that the superior court's decision was not supported by substantial evidence.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.